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No. 80-824

In the Supreme Court of the United States

OCTOBER TERM, 1980

POLK COUNTY, ET AL., PETITIONERS

v.

RUSSELL RICHARD DODSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether a county-employed public defender acts under color of state law, within the meaning of 42 U.S.C. 1983, in representing indigent criminal defendants.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement:	
A. Procedural History	3
B. Statutory scheme	5
Summary of argument	7
Argument:	
A county-employed public defender acts under color of state law, within the meaning of 42 U.S.C. 1983, in representing indigent criminal defendants	9
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144	2, 9, 11
Barnes v. *Dorsey*, 480 F.2d 1057	12
Braden v. *University of Pittsburgh*, 552 F.2d 948	21
Branti v. *Finkel*, 445 U.S. 507	14
Brown v. *Joseph*, 463 F.2d 1046, cert. denied, 412 U.S. 950	17
Burton v. *Wilmington Parking Authority*, 365 U.S. 715	8, 9, 18, 19, 20
Chalfant v. *Wilmington Institute*, 574 F.2d 739	21
Civil Rights Cases, 109 U.S. 3	12
Conley v. *Gibson*, 355 U.S. 41	22
Cuyler v. *Sullivan*, 446 U.S. 335	20
Douglas v. *California*, 372 U.S. 353	15
Espinoza v. *Rogers*, 470 F.2d 1174	17
Estelle v. *Gamble*, 429 U.S. 97	15
Ferri v. *Ackerman*, 444 U.S. 193	8, 13

Cases—Continued Page

French v. *Corrigan*, 432 F.2d 1211, cert. denied, 401 U.S. 915 12
Gideon v. *Wainwright*, 372 U.S. 335 15
Hall v. *Quillen*, 631 F.2d 1154 12
Hollenbaugh v. *Carnegie Free Library*, 545 F.2d 382 12
Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345.. 19, 21
Johnson v. *Hackett*, 284 F. Supp. 933 11
Miller v. *Barilla*, 549 F.2d 648 17
Monroe v. *Pape*, 365 U.S. 167 .....2, 9, 10, 21, 23
Mulligan v. *Schlachter*, 389 F.2d 231 12
Page v. *Sharpe*, 487 F.2d 567 12
Peake v. *County of Philadelphia*, 280 F. Supp. 853.. 18
Robinson v. *Bergstrom*, 579 F.2d 401 .....16, 17, 21
Robinson v. *Jordan*, 494 F.2d 793 ..... 14, 17
Rogers v. *Okin*, 634 F.2d 650, cert. granted on questions unrelated, No. 80-1417 (Apr. 20, 1981) 15
Screws v. *United States*, 325 U.S. 91 .....9, 10, 23
Shelley v. *Kraemer*, 334 U.S. 1 12
Skipper v. *Brummer*, 598 F.2d 427, vacated and remanded on other grounds, 444 U.S. 1063 16-17
Slavin v. *Curry*, 574 F.2d 1256, modified on other grounds, 583 F.2d 779 16
Stengel v. *Belcher*, 522 F.2d 438, cert. dismissed as improvidently granted, 429 U.S. 118 11
Sullens v. *Carroll*, 446 F.2d 1392 17
Thomas v. *Howard*, 455 F.2d 228 18
United States v. *Classic*, 313 U.S. 299.....7, 8, 9, 10, 18, 21
United States v. *Price*, 383 U.S. 787 ..... 2, 9
United States v. *Senak*, 477 F.2d 304, cert. denied, 414 U.S. 856 ..... 16, 23
United States v. *Senak*, 527 F.2d 129, cert. denied, 435 U.S. 907 16
United States ex rel. Simmons v. *Zibilich*, 542 F.2d 259 17
United States ex rel. Wood v. *Blacker*, 335 F. Supp. 43 17
Williams v. *United States*, 341 U.S. 97 9

Constitution, statutes and rule: Page

United States Constitution:

Sixth Amendment 22
Eighth Amendment 22
Fourteenth Amendment 3-4, 9, 22
18 U.S.C. (1940 ed.) 52 10
18 U.S.C. 242 ..... 2, 9, 10
28 U.S.C. 2254 4
42 U.S.C. (& Supp. III) 1983 ..... *passim*
Iowa Code Ann. (West 1977 & Cum. Supp. 1980):
Chapter 336A 5
§ 336A.1 5
§ 336A.2 6
§ 336A.3 6
§ 336A.4 6
§ 336A.5(1) 6
§ 336.5(2) 6
§ 336A.5(3) 6
§ 336A.6 11
§ 336A.7 14
§ 336A.8 7
§ 336A.9 6
§ 336A.10 6
§ 336A.11 7
Iowa R. App. P. 104 3

Miscellaneous:

Liability of Public Defenders under Section 1983: Robinson v. *Bergstrom*, 92 Harv. L. Rev. 943 (1979) 14, 21-22
Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 Colum. L. Rev. 656 (1974) 20

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INTEREST OF THE UNITED STATES

The statute involved in this case, 42 U.S.C. 1983,[1] establishes civil liability for any deprivation of fed-

[1] 42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Recent amendments to the provision (see 42 U.S.C. (Supp. III) 1983) do not affect the issue in this case.

eral constitutional or statutory rights under color of state law. The same conduct is subject to criminal prosecution by the United States under 18 U.S.C. 242.[2] The phrase "under color of * * * law" is accorded the same meaning under Section 242 as under Section 1983. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 152 n.7 (1970); *United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966); *Monroe* v. *Pape*, 365 U.S. 167, 185 (1961). Resolution of the color of law question presented in this case will therefore have a direct effect on the ability of the United States to prosecute similar conduct under 18 U.S.C. 242. See, *e.g.*, *United States* v. *Senak*, 477 F.2d 304 (7th Cir.), cert. denied, 414 U.S. 856 (1973) (prosecution of public defender for exacting payment from clients', friends or relatives for performance of his duties).[3]

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[2] 18 U.S.C. 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

[3] We leave to the parties the question of immunity under Section 1983 for public defenders. Resolution of that question will not directly affect criminal prosecutions under Section 242.

STATEMENT

A. Procedural history

Respondent filed a pro se complaint under 42 U.S.C. 1983 in the United States District Court for the Southern District of Iowa, alleging that petitioner Martha Shepard, an attorney in the Polk County Offender Advocate's Office, had failed to represent him adequately in his appeal of a robbery conviction to the Iowa Supreme Court (A. 4-23).[4] Ms. Shepard, who had been appointed to represent respondent on his appeal, had moved to withdraw as counsel and to have the appeal dismissed as frivolous, pursuant to Rule 104 of the Iowa Rules of Appellate Procedure.[5] The motion had been granted and the appeal had been dismissed (Pet. App. A3). Respondent alleged in his Section 1983 complaint that petitioner Shepard's conduct had deprived him of his right to counsel, inflicted on him cruel and unusual punishment, and arbitrarily denied him his state-created right to appeal in violation of the Due Process

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[4] "A." refers to the joint appendix. "Pet. App." refers to the appendix to the petition.

[5] Rule 104 provides in pertinent part:

> (a) If counsel appointed to represent a convicted indigent defendant in an appeal to the Supreme Court is convinced after conscientious investigation of the trial transcript that the appeal is frivolous and that he cannot, in good conscience, proceed with the appeal, he may move the Supreme Court in writing to withdraw. * *
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> * * * * *
>
> (d) * * * If [the Supreme Court] finds [that the appeal is wholly frivolous], it may grant counsel's motion to withdraw and dismiss the appeal.
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> * * * * *

Clause of the Fourteenth Amendment. The complaint also included pendent state claims for malpractice and for breach of an oral contract to prosecute the appeal (*id.* at A3-A4).

The complaint also named the Polk County Offender Advocate, the Polk County Board of Supervisors, and the County itself as defendants (Pet. App. A4). Respondent alleged that these petitioners were responsible for Ms. Shepard's actions because they had established rules and procedures for her to follow in handling criminal appeals (*ibid.*). The complaint sought both monetary damages and injunctive relief, including release from confinement (A. 21-22).

The district court (Pet. App. B) dismissed the suit as frivolous. The claim for release from confinement was treated as a request for habeas corpus relief under 28 U.S.C. 2254, and was dismissed for failure to exhaust state remedies as required by that statute (Pet. App. B3). The remaining federal claims were dismissed for failure to state a claim cognizable under 42 U.S.C. 1983. The court ruled that petitioner Shepard and the Polk County Offender Advocate had not acted "under color of state law," and that the complaint did not allege the requisite personal involvement on the part of Polk County and its Board of Supervisors (Pet. App. B3-B12). The pendent state claims were also dismissed (*id.* at B12).

On appeal, the court of appeals, in a divided opinion (Pet. App. A), reversed the judgment of the district court and remanded the case for further proceedings as to all claims except respondent's claim for release from confinement (the dismissal of which was affirmed). The court of appeals held that a county-employed public defender *does* act under color of state law in representing indigent defendants (*id.*

at A6-A7), and that he or she enjoys only a qualified immunity from liability for actions taken while representing such clients (*id.* at A14-A15). The court further held (*id.* at A16-A17) the allegations of the complaint sufficient, as a matter of pleading, to state a Section 1983 claim against the Offender Advocate and against the Board of Supervisors, and that these individuals would enjoy the same degree of immunity as Ms. Shepard. As to Polk County as an entity, the court indicated (*id.* at A19) that respondent should be given the opportunity on remand to amend his complaint so as to state his claim against the County with more specificity. The pendent state claims were also ordered reinstated (*id.* at A20).

B. Statutory scheme

Chapter 336A of the Iowa Code (West 1977 & Cum. Supp. 1980) authorizes the board of supervisors of any county to establish, by resolution, the office of public defender (Iowa Code Ann. §§ 336A.1).[6] The establishment and operation of the office are financed by appropriations from the county's court fund, al-

[6] The district court, in a footnote (Pet. App. B5 n.2) without further explanation, took judicial notice that the particular public defender's office involved here, the Polk County Offender Advocate, "does not exist under the authority of Iowa Code Chapter 336A," but rather "is the independent creation of the Polk County Board of Supervisors." We find nothing in the record to support that determination. Moreover, Iowa's statutory scheme, which was in existence at the time the Offender Advocate was established, does not appear to allow for the independent creation of a public defender's office that is not subject to Chapter 336A. Rather, any county choosing to establish a public defender's office apparently must comply with that chapter. We note that petitioners refer to that chapter as authorizing the office here. See Pet. Br. 3-5.

though the county may also accept contributions from private organizations and individuals and other public agencies (§ 336A.2).[7]

The public defender is appointed by the county's board of supervisors, which chooses between two candidates nominated and certified by the district court judges of the judicial district in which the county is located (§ 336A.3). The public defender may appoint such assistant attorneys and support personnel as the board considers necessary, in the manner prescribed by the board (§ 336A.5(2)). The compensation of those appointees and of the public defender is fixed by the board (§§ 336A.5(1) and 336A.5(3) (West Cum. Supp. 1980)). The board provides office space, furniture, equipment, and supplies, or an allowance in lieu of such facilities, to the public defender (§ 336A.9; see Pet. Br. 4). The board also establishes the criteria by which the public defender (before the initial court appearance) or the court (at or after the initial court appearance) determines whether a criminal defendant is an indigent entitled to representation by the public defender (§ 336A.4).

The board may require that public defenders and their assistants devote full-time to their positions and not engage in the private practice of law (§ 336A.10 (West Cum. Supp. 1980)).[8] Moreover, public defenders and their assistants are prohibited from recommending a particular attorney, or from referring any litigation or other legal matter to a particular attorney, if the county is or is likely to be

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[7] The Polk County Offender Advocate, however, is fully funded by the county (see Pet. App. B5 n.2).

[8] The Polk County Offender Advocate employs only full-time public defenders (see Pet. App. B5 n.2).

a party to or have a substantial interest in the matter (§ 336A.11 (West Cum. Supp. 1980)).

The public defender is required to prepare an annual report of all of the cases handled during the preceding year (§ 336A.8). The report must be submitted to the judges of the county's district court, to the attorney general, and to the county's board of supervisors (*ibid.*).

SUMMARY OF ARGUMENT

1. As a full-time public defender in the office of the Polk County Offender Advocate, petitioner Shepard is hired and compensated by the County under a state statutory scheme that makes it her duty to represent indigent criminal defendants in the Iowa courts at trial and on appeal. Respondent has alleged that he was deprived of constitutional rights through her representation of him in the appeal of his conviction. Because, in performing this task in her role as public defender, petitioner Shepard was acting within the scope of her government employment, exercising powers and responsibilities that she had by virtue of her position, and performing an essential governmental function—enabling the State to fulfill its constitutional duty to provide counsel for indigent criminal defendants—she was acting "under color of * * * law" as that phrase has been defined in *United States* v. *Classic*, 313 U.S. 299 (1941), and its progeny, construing 42 U.S.C. 1983 or its criminal law counterparts.

There is no merit to petitioners' contention that public defenders should not be held to act under color of law with respect to representation of indigent defendants unless court-appointed private attorneys are considered similarly liable under Section

1983 for such representation. The similarities in their duties to the defendants are outweighed, for purposes of Section 1983 liability, by the fact that, unlike private attorneys, public defenders are government employees performing these duties as part of their regular government employment. In any event, because Section 1983 reaches only state action, it is inevitable that some private actors may escape liability for actions that, if taken by a state employee, would come within the statute. *Ferri* v. *Ackerman*, 444 U.S. 193 (1979), on which petitioners heavily rely, has no bearing on the "color of law" issue, since that case concerned only the question whether there was any federal requirement that private attorneys appointed to represent criminal defendants in federal trials be granted immunity from liability in state malpractice actions.

2. While we submit that the court of appeals' holding on the "color of law" issue should be affirmed on the authority of *United States* v. *Classic*, *supra*, we believe that the same result may be reached under the analysis of *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). *Burton* generally stands for the proposition that the conduct of even a private actor may constitute state action if a symbiotic relationship between the actor and the State is shown. That relationship is clearly present here where the state statute establishes the office, provides for its support by public funds, and defines the duties of its public defender employees. The State, in part through its creature, the County, has thereby "elected to place its power, property, and prestige" (*id.* at 725) behind the official activities of the office of the Offender Advocate. Moreover, because the complaint alleges that petitioner Shepard violated respondent's constitutional rights in a manner that was in accord-

ance with rules and practices of her office, it satisfies an even stricter test than *Burton* by alleging direct involvement by the governmental agency in the particular acts at issue.

ARGUMENT

A COUNTY-EMPLOYED PUBLIC DEFENDER ACTS UNDER COLOR OF STATE LAW, WITHIN THE MEANING OF 42 U.S.C. 1983, IN REPRESENTING INDIGENT CRIMINAL DEFENDANTS

Only persons who act "under color of * * * law" may be liable under 42 U.S.C. 1983. This Court has construed that phrase on a number of occasions in cases involving Section 1983 or its criminal law counterpart, 18 U.S.C. 242 (and its predecessor). *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Monroe* v. *Pape*, 365 U.S. 167, 183-187 (1961); *Williams* v. *United States*, 341 U.S. 97, 99 (1951); *Screws* v. *United States*, 325 U.S. 91, 109-113 (1945); *United States* v. *Classic*, 313 U.S. 299 (1941). Moreover, because "[i]n cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment" (*United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966)), the issue in this case is also illuminated by the analysis in cases such as *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), which concerned the question whether certain racially discriminatory conduct was "state action" in violation of rights under the Fourteenth Amendment. Under the principles of all of these cases, we submit, petitioner Shepard acted "un-

der color of [state] law" in her representation of respondent.[9]

1. In *United States* v. *Classic*, *supra*, this Court reviewed the criminal convictions of certain Commissioners of Elections, who had been found guilty of violating 18 U.S.C. (1940 ed.) 52, the predecessor of 18 U.S.C. 242, by willfully altering and making a false count and certification of ballots cast by voters in a Democratic primary election. In explaining how the "color of law" element of the offense had been established, the Court stated (313 U.S. at 325-326 (citations omitted)):

> The alleged acts of appellees [the Commissioners] were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

This construction of the term was later reaffirmed in *Screws* v. *United States*, *supra*, 325 U.S. at 109-113, and *Monroe* v. *Pape*, *supra*, 365 U.S. at 184, cases concerned with unlawful behavior by police officers who, as the Court noted in each case (325 U.S. at 110; 365 U.S. at 184), committed the acts in question in the course of performing their official

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[9] We refer only to petitioner Shepard because, if the complaint's allegations concerning her may be taken as describing acts "under color of [state] law," the same conclusion would follow *a fortiori* with respect to her superior, the Offender Advocate. We note that petitioners' brief appears to focus almost exclusively on persons in the position of petitioner Shepard.

duties, although their conduct amounted to a gross misuse of their lawful authority.

That formulation of the "color of law" test controls the present case. Petitioner Shepard possesses her power as to each defendant by virtue of the appointments she receives in her capacity as an attorney-employee in the office of the Polk County Advocate. Her principal duties are defined in the state code. She is to represent each indigent defendant assigned to her "at every stage of the proceedings against him" and to "prosecute any appeals or other remedies before or after conviction that [s]he considers to be in the interest of justice" (Iowa Code Ann. § 336A.6 (West 1977)). Respondent has alleged that in the course of her exercise of that state-conferred authority in representing him, he was deprived of various constitutional rights, and he has therefore adequately alleged action under color of state law within the meaning of 42 U.S.C. 1983.

This case presents none of the typical problems in cases brought under 42 U.S.C. 1983 or its criminal law counterparts in distinguishing between private action and action under color of law. There is no suggestion that the acts allegedly depriving respondent of constitutional rights were purely "personal" acts outside the scope of petitioner Shepard's employment. Compare, *e.g.*, *Stengel* v. *Belcher*, 522 F.2d 438, 441 (6th Cir. 1975), cert. dismissed as improvidently granted, 429 U.S. 118 (1976), with *Johnson* v. *Hackett*, 284 F.Supp. 933, 937 (E.D. Pa. 1968). Nor is this a case involving a private individual in which liability under Section 1983 turns on a finding of action in concert with a state officer or employee. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, *supra*, 398 U.S. at 152. Petitioner Shepard is herself the state employee, *i.e.*, an employee of the

County, which, as the court of appeals noted (Pet. App. A6), is, "of course, merely a creature of the State."

The fact that petitioner Shepard's duties as a lawyer for indigents resemble those performed by private attorneys appointed to represent indigents and that in both instances the lawyer has a duty of loyalty to the client does not, as petitioners contend (Pet. Br. 31-40), dictate a different result. It is true that the courts have uniformly held that court-appointed private attorneys do not act "under color of state law" in their representation of indigents at government expense.[10] The mere similarity of functions between the duties of those court-appointed attorneys and the duties of public defenders, however, does not require equivalent treatment under Section 1983. Only state action, not private conduct, is encompassed by Section 1983, which, like the Fourteenth Amendment, "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948), citing *Civil Rights Cases*, 109 U.S. 3, 11 (1883). Accordingly, Section 1983 proscribes certain conduct by state actors even though identical conduct by private actors is not reached by the statute. There is thus no inconsistency in holding public defenders liable under Section 1983 because they are state

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[10] See, *e.g.*, *Page* v. *Sharpe*, 487 F.2d 567, 570 (1st Cir. 1973); *Hall* v. *Quillen*, 631 F.2d 1154, 1156 (4th Cir. 1980); *Mulligan* v. *Schlachter*, 389 F.2d 231, 233 (6th Cir. 1968); *French* v. *Corrigan*, 432 F.2d 1211, 1214 (7th Cir. 1970), cert. denied, 401 U.S. 915 (1971); *Barnes* v. *Dorsey*, 480 F.2d 1057, 1061 (8th Cir. 1973). We take no position on the correctness of these decisions since the Court need not, in the present case, decide the status, for Section 1983 purposes, of attorneys in such circumstances.

employees even if private attorneys are not similarly liable.[11]

Indeed, the differences in legal circumstances between the two categories of attorneys are quite marked. Private attorneys who receive court appointments to represent indigents, either as an exception to their normal routine of private representation of clients or as a large proportion of their practice, are not assured of a continuous flow of such assignments. In undertaking such assignments, they function as private practitioners retained by the State to represent particular clients. Their relationship to the State is that of professional independent contractors, rather than employees. Full-time public defenders, who are compensated on a continuing, salaried basis by a state or local agency pursuant to state statute, who are regularly assigned by the court to represent indigent criminal defendants by virtue of their employment, and whose sole function as public defenders is to undertake such representation, are, by contrast, public employees. The difference between their employment relationship with the State and the State's relationship with retained, appointed counsel results in many differences in legal consequences, such as tax treatment of their compensation, appli-

[11] Petitioners' reliance (Pet. Br. 54-64) on *Ferri* v. *Ackerman*, 444 U.S. 193 (1979), is unpersuasive. To be sure, in *Ferri* the Court analogized the duties of court-appointed private attorneys who receive federal compensation for representing indigents to the duties of privately retained attorneys. But even assuming that the duties of full-time public defenders are like those of court-appointed private attorneys, *Ferri* has no bearing on the "color of law" issue here. *Ferri* was a state malpractice action and the question decided by the Court was whether such court-appointed attorneys enjoyed the absolute immunity to suit shared by judges and prosecutors.

cation of principles of *respondeat superior*, application of anti-discrimination laws, etc. And see *Branti* v. *Finkel*, 445 U.S. 507 (1980). And, as the court of appeals recognized (Pet. App. A6), public defenders have the power and the responsibility to represent particular defendants specifically because of their positions as public employees. Moreover, the public defender appears to his indigent client as an individual clothed with the authority of the State: the indigent client has had no voice in the selection of the attorney, and the public defender assigned to represent him is in a very real sense the choice of the public officer responsible for hiring the staff of the public defender's office as well as the judge who makes the appointment. See *Liability of Public Defenders Under Section 1983: Robinson* v. *Bergstrom*, 92 Harv. L. Rev. 943, 946-947 (1979).[12]

To be sure, as petitioners (Pet. Br. 13-15, 32-33) and the dissenting judge below (Pet. App. A25) point out, a public defender—like any other attorney—has a strict professional duty of loyalty to the interests of his client. They apparently reason from this that, at least at the point the defender takes on the representation of a client, his state power must be deemed to disappear. But most licensed professional employees have a duty to the ethics of their profession and those whom they serve, and this fact is not thought to strip their conduct of the character of

[12] An indigent defendant may request that an attorney other than the public defender be appointed to represent him, but such a motion will be granted only "for cause." Iowa Code Ann. § 336A.7 (West 1977). Cf. *Robinson* v. *Jordan*, 494 F.2d 793, 795 (5th Cir. 1974), in which the court held that a county health officer acted "under color of [state] law" in treating a county jail detainee, who was prevented by his detention from seeking a physician of his choice.

state action for the purposes of Section 1983 liability. Physicians, for example, have a duty to act in the best interests of their patients, but this has not been raised as an objection to subjecting physicians employed by public institutions to liability in Section 1983 suits relating to their treatment of patients in such institutions. See, *e.g.*, *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (prison medical director who also personally treated the prisoner-plaintiff); *Rogers* v. *Okin*, 634 F.2d 650 (1st Cir. 1980) (state health officials and hospital physicians charged with violating the rights of mental patients by requiring the patients to submit to certain types of medications), cert. granted on questions unrelated to status of physician-defendants, No. 80-1417 (Apr. 20, 1981). In the case of both public employee physicians and public employee defense attorneys, however, the fact remains that it is the government that hires, compensates, and fires them, and sets the conditions under which they perform their duties to patients and clients. Moreover, in each case the very performance of the duty to the patient or client may also serve an essential governmental function. In the case of public defenders, it is the State's fulfillment of its obligation to make legal assistance available to indigents at trial and on first appeal. See *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963).

If the nature of public defenders' duties in representing indigent clients makes it undesirable to subject them to liability for actions taken in the course of performance of those duties, the point may properly be raised in connection with the question of their immunity from such suits. It has no bearing, however, on the question whether they act under color

of law while performing the tasks for which they were hired.

Finally, both petitioners (Pet. Br. 46-54) and the dissenting judge below (Pet. App. A21-A22) rely on what they perceive as the weight of appellate authority. In fact, however, only four courts of appeals have ruled on the question at issue in this case and only two have supported petitioners' position. The Eighth Circuit in the present case (Pet. App. A) has joined the Seventh Circuit in *Robinson* v. *Bergstrom*, 579 F.2d 401, 405-408 (1978), in holding that public defenders *do* act under color of state law in their representation of indigent defendants.[13] See also *United States* v. *Senak*, 477 F.2d 304, 307-308 (7th Cir.), cert. denied, 414 U.S. 856 (1973) (reversing dismissal of indictment under criminal counterpart of Section 1983); *United States* v. *Senak*, 527 F.2d 129, 149-150 (7th Cir. 1975), cert. denied, 425 U.S. 907 (1976) (reaffirming prior decision following conviction). The Fifth and Tenth Circuits, on the other hand, have held that they do not. *Slavin* v. *Curry*, 574 F.2d 1256, 1265 (5th Cir.), modified on other grounds, 583 F.2d 779 (5th Cir. 1978); *Skipper* v. *Brummer*, 598 F.2d 427, 428 (5th Cir. 1979), vacated and remanded on other grounds,

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[13] We note that *Robinson* v. *Bergstrom*, *supra*, involved a county-employed public defender who worked only part-time at that job; while he was compensated by the county for his work as public defender, he maintained a private practice on the side. 579 F.2d at 402. We perceive no meaningful distinction between that case and this; in any event, the reasoning of *Robinson* is, if anything, even more compelling as to full-time public defenders.

444 U.S. 1063 (1980);[14] *Espinoza* v. *Rogers*, 470 F.2d 1174, 1175 (10th Cir. 1972).[15]

In this Court, however, those decisions are significant only for the strength of their reasoning, and the Seventh Circuit's opinion in *Robinson* v. *Bergstrom*, on which the court of appeals in this case strongly relied, represents the only thorough consideration of the question—one that rests on a careful reading of this Court's decisions. The Fifth Circuit decisions simply stated without explanation that no state action was involved, citing cases concerning court-appointed private attorneys rather than public defenders.[16] The Tenth Circuit briefly articulated two grounds for its conclusion to the same effect, but did not explore competing considerations; and all of its supporting citations, with the exception of one district court opinion,[17] again involved court-appointed

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[14] But *cf. Robinson* v. *Jordan*, *supra*, 494 F.2d at 795.

[15] In addition, the Third and Ninth Circuits, while not deciding the question, have supported in dicta the latter position. *Brown* v. *Joseph*, 463 F.2d 1046, 1048 (3d Cir. 1972), cert. denied, 412 U.S. 950 (1973); *Miller* v. *Barilla*, 549 F.2d 648, 650 (9th Cir. 1977). Instead of deciding the state action question, these circuits ruled that public defenders are entitled to absolute immunity from liability under Section 1983. *Brown* v. *Joseph*, *supra*, 463 F.2d at 1048-1049; *Miller* v. *Barilla*, *supra*, 549 F.2d at 649.

[16] See *United States ex rel. Simmons* v. *Zibilich*, 542 F.2d 259, 261 (5th Cir. 1976) (private attorney volunteering services through local "indigent defender" board); *Sullens* v. *Carroll*, 446 F.2d 1392 (5th Cir. 1971) (malpractice suit against court-appointed attorney in federal criminal case decided on immunity grounds).

[17] See *United States ex rel. Wood* v. *Blacker*, 335 F.Supp. 43 (D.N.J. 1971).

private attorneys.[18] Neither court supplied any reason for equating public defenders with court-appointed private attorneys.

Whatever the correct rule respecting private attorneys who represent indigents under court appointment, however, the court below correctly applied the straightforward analysis of this Court's decisions (see pages 9-11, *supra*) in holding that county-employed public defenders act under color of law in performing their duty as public employees to represent indigent defendants in criminal proceedings.

2. As we have argued above, the holding of the court of appeals on the color of law issue should be affirmed on the authority of *United States* v. *Classic*, *supra*, a case petitioners do not cite in their brief. That holding may also be affirmed, however, by application of principles stated in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), a case cited by petitioners (Pet. Br. 42-43) as distinguishable on the ground that it involved "extensive participation" by the State in the operation of the parking facility that housed the enterprise responsible for the racially discriminatory actions at issue in the case.

In fact, the parking authority in *Burton* was the sole operator of the parking facility; it was through its lease of commercial space in the facility to a restaurant that discriminated against blacks that the state action question arose. This Court concluded that the restaurant's refusal to serve black patrons was state action under the Fourteenth Amendment notwithstanding that the restaurant was a private

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[18] See *Thomas* v. *Howard*, 455 F.2d 228 (3d Cir. 1972) (dicta in suit barred by statute of limitations); *Peake* v. *County of Philadelphia*, 280 F.Supp. 853 (E.D. Pa. 1968).

business. It based its holding on its findings (365 U.S. at 723-725) (1) that the commercially leased areas, including the restaurant, "constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its [parking] project as a self-sustaining unit," (2) that the benefits of the arrangement were reciprocal (the restaurant's profits contributed to "the financial success" of the parking authority and the restaurant benefited from the convenient parking facility for its patrons), and (3) that the State had the ability to require the restaurant, through the terms of the lease, to serve patrons without regard to race. The Court concluded (*id.* at 725) that through "its inaction, the Authority, and through it the State, [had] not only made itself a party to the refusal of service, but [had] elected to place its power, property, and prestige behind the admitted discrimination" and that the State had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity * * *."

Burton, then, stands for the proposition that the conduct of a private actor may constitute state action if a "symbiotic relationship" between the actor and the State is shown. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357-358 (1974), explaining *Burton*. State action is therefore demonstrable *a fortiori* where the conduct is that of one of the State's employees engaged in the duties for which the State pays the compensation. Here, the State of Iowa, by establishing the statutory basis for the office of the Offender Advocate, by providing for its financing in whole or in part out of public funds, by providing (through the County) its office space, furniture, and equipment, and by benefiting, in re-

turn, from the performance, by the defenders, of a public service that the State is obligated to provide as part of its criminal justice system, has "elected to place its power, property, and prestige" (*Burton* v. *Wilmington Parking Authority*, *supra*, 365 U.S. at 725) behind the official conduct of the attorneys employed in the Office of the Offender Advocate engaged in representing indigent criminal defendants. Even though petitioner Shepard's representation of respondent is in some respects analogous to the work of a private attorney, then, the state action, or color of law, element is unmistakably present. See Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 Colum. L. Rev. 656, 672-677 (1974) (state action through government funding).[19]

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[19] We note also that in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), this Court held that, for purposes of testing the constitutionality of a state criminal conviction in a federal habeas corpus proceeding, ineffective assistance of counsel by a defendant's retained *private* attorney may constitute state action. The Court noted (*id.* at 343; citations omitted) that "a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment." Thus, regardless of the fact that fundamental unfairness in a trial may be the result of the conduct of private counsel, "[w]hen a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty" (*ibid.*; citation omitted). We do not suggest that *Sullivan* controls the present case, since the purpose of the "state action" inquiry here is different; but *Sullivan* does show that it is an oversimplification to suggest that the State has no connection with the public defender's representation of indigents unless it can be shown that the defender has less autonomy than private counsel in representing indigent defendants.

Petitioners argue (Pet. Br. 36) that a Section 1983 complaint against a public defender fails unless it alleges not only that the State (or its creature, the County) hires and compensates the defender but that it also directly involves itself otherwise in the actions alleged as deprivations of constitutional rights. We disagree for two reasons. First, as we have shown, this is not a requirement under *United States* v. *Classic*, *supra*, and its progeny, since the conduct of a state employee may be state action even when it is in defiance of state law. See *Monroe* v. *Pape*, *supra*, 365 U.S. at 172, 187. Second, petitioners' contention is another way of stating an argument correctly rejected by the Seventh Circuit in *Robinson* v. *Bergstrom*, *supra*, in reliance on a line of decisions in the Third Circuit.[20] As the *Robinson* v. *Bergstrom* court concluded in reviewing those cases, when the actor whose conduct is at issue is a state instrumentality or the agent or employee of such an instrumentality, there is no need, under *Burton*, to establish a particular nexus between the challenged conduct and state policy. Such a nexus showing is required only where, as in *Jackson* v. *Metropolitan Edison Co.*, *supra*, the one whose actions are in question is a private person or enterprise, albeit one heavily regulated by the State. *Robinson* v. *Bergstrom*, *supra*, 579 F.2d at 406-407.

In any event, even were the *Jackson* nexus requirement applicable in the present case, it would be satisfied. First, as one commentator has noted (*Liability of Public Defenders under Section 1983:*

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[20] *Chalfant* v. *Wilmington Institute*, 574 F.2d 739 (3d Cir. 1978) (en banc); *Braden* v. *University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977) (en banc); *Hollenbaugh* v. *Carnegie Free Library*, 545 F.2d 382 (3d Cir. 1976).

Robinson v. *Bergstrom*, 92 Harv. L. Rev. 943, 947 (1979) (footnote omitted)):

> [S]tate [or county] control over the number of attorneys and support personnel in the public defender's office will affect the public defender's caseload and thus circumscribe his discretion regarding the amount of time to devote to each case. As a consequence, the state effectively influences decisions made by public defenders in a way that it cannot influence those made by private attorneys.

Second, the requirement of an annual report to State and County officials by the public defender's office, combined with the County's power to fire and replace the public defender who heads the office, makes the public defenders responsible to the State for their performance in the representation of their clients, and allows the State to exercise some degree of supervisory review over that performance. Finally, respondent's complaint, given the liberal reading accorded pro se complaints (see *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)), appears to allege (A. 5-6, 8, 20-21) that petitioner Shepard's handling of his appeal was in keeping with the regular practices of the office of the Offender Advocate, which in turn was governed by "grounds rules" [sic] established by Polk County. In short, respondent alleges, that petitioner Shepard treated his appeal in a manner that deprived him of rights under the Sixth, Eighth, and Fourteenth Amendments and that she did so in accordance with the policies of her office and of the County. This is an allegation of state action under the very strictest test.

Indeed, these allegations appear sufficient to satisfy the narrow interpretation of the statutory phrase "under color of * * * law" espoused in the dissenting opinions in *Screws* (325 U.S. at 138) and *Monroe* v. *Pape* (365 U.S. at 202; see also *id.* at 192 (concurring opinion)), which this Court rejected as unduly restrictive. It follows *a fortiori* that the complaint alleges acts performed under color of state law within the meaning of 42 U.S.C. 1983. And, for the reasons previously discussed, the same conclusion would be required by this Court's decisions in the absence of those allegations. Cf. *United States* v. *Senak, supra.*

CONCLUSION

The judgment of the court of appeals on the color of law question should be affirmed.

Respectfully submitted.

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